JD(SF)–46–05
San Francisco Bay Area,
California

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO BRANCH OFFICE
DIVISION OF JUDGES

FARRIS ELECTRIC, INC.
Employer

and 32-RC-5327

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS,
LOCAL UNION 332, AFL-CIO
Petitioner

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ADMINISTRATIVE LAW JUDGE'S REPORT AND RECOMMENDATIONS ON CHALLENGED BALLOTS

On May 9, 2005,[1] the Regional Director for Region 32 of the National Labor Relations Board (Board) issued a Report on Challenged Ballots and Notice of Hearing in the above-captioned matter, finding that certain challenged ballots raised substantial and material issues of fact that could best be resolved by a hearing, ordered that a hearing be conducted before an administrative law judge.

The hearing was held on May 23 in Oakland, California. The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses and to introduce relevant evidence. Since the close of hearing, briefs have been received from the Employer and the Petitioner. Upon the entire record, and based upon my observation of the witnesses and consideration of the briefs submitted, I make the following:

[1] All dates herein refer to 2005 unless otherwise stated.

Findings of Fact

I. Procedural History

Pursuant to a Stipulated Election Agreement approved by the Regional Director on March 28, the Regional Director conducted an election by secret ballot on April 15 in the following appropriate collective-bargaining unit:

> All full-time and regular part-time journeyman and apprentice electricians, including working forepersons, employed by and performing work for the Employer at its jobsites in the San Francisco Bay area, including but not limited to San Mateo, Santa Clara and Alameda Counties, California; excluding all managerial and administrative employees, estimators, office clerical employees, guards, and supervisors within the meaning of the Act.

The Region served the Tally of Ballots upon the parties at the conclusion of the election, which shows:

Approximate number of eligible voters	25
Number of void ballots	0
Number of votes cast for Petitioner	8
Number of votes cast against participating labor organization	9
Number of valid votes counted	17
Number of challenged ballots	9
Valid votes counted plus challenged ballots	26

The challenged ballots were sufficient in number to affect the results of the election.

In his May 9 Report on Objections the Regional Director set for hearing the challenged ballots of five employees, Tony Vega, Daniel Sohler, Corey Howey, Kevin Youngs, and Allan Martinez. In addition, the Regional Director approved a stipulation of the parties that employees Shane Parisi and Mario Munoz were eligible to vote in the election and that their ballots should be opened and, at the appropriate time, counted. Finally, the Regional Director sustained the challenges to the ballots of two other employees.[2]

II. The Challenged Ballots

In the Report on Challenged Ballots and Notice of Hearing it was found that the Board agent challenged the ballots of Tony Vega and Daniel Sohler on the ground that their names did not appear on the voter eligibility list supplied by the Employer. The Petitioner challenged the ballots of Kevin Youngs and Corey Howey on the ground that each failed to meet the Board's general rule for eligibility to vote in the election. The Union also challenged the ballot of Allan Martinez on the ground that he may be a statutory supervisor. The Employer contends that Tony Vega was a statutory supervisor and that Daniel Sohler had voluntarily quit his employment with the Employer in June 2004.

[2] I have been administratively advised that the Petitioner has filed timely exceptions with the Board to the Regional Director's finding that employee Jason Sirany was not an eligible voter. Sirany's challenged ballot was not set for hearing before me and the Board has not yet acted on the Petitioner's exceptions.

A. The Ballots of Tony Vega and Allan Martinez

As stated above, the Employer contends that Tony Vega was a statutory supervisor and thus, not eligible to vote in the election. The Union contends that Vega was a working foreman and not a statutory supervisor. Further, the Union contends that if Vega is found to be a statutory supervisor then Allan Martinez, also a foreman should be found to be a statutory supervisor. The Employer contends that Allan Martinez was a working foreman and never was a foreman on a project as large as that overseen by Vega.

As mentioned above, the parties stipulated that working forepersons were included in the bargaining unit. In the instant case, Vega was a leading employee organizer for the Union and the Employer contends that Vega, unlike its other foremen, was a statutory supervisor.

Section 2(11) of the Act, 29 U.S.C. § 152(11), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The enumerated powers in Section 2(11) are to be read in the disjunctive. *NLRB v. McEver Engineering*, 784 F.2d 634 (5th Cir. 1986); *Amperage Electric*, 301 NLRB 5 (1991). However, possession of one or more of the stated powers does not convert an employee into a 2(11) supervisor unless the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. Section 2(11); *Electrical Workers IBEW Local 428 (Kern County Chapter NECA),* 277 NLRB 397, 408 (1985); *Hydro Conduit Corp.*, 254 NLRB 433, 437 (1981). The party asserting that an individual is a supervisor under the Act bears the burden of proof regarding supervisory status. *Bennett Industries*, 313 NLRB 1363 (1994); *NLRB v. Kentucky River Community Care*, 121 S. Ct. 1861, 1866-1867 (2001), *Benchmark Mechanical Contractors, Inc.*, 327 NLRB 829 (1999); *Alois Box Co., Inc.*, 326 NLRB 1177 (1998), and *Youville Health Care Center, Inc.*, 326 NLRB 495 (1998). Any lack of evidence is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, fn. 8 (1999).

From October 18 to November 9, 2004, Vega worked as a journeyman electrician. On November 9, Vega was made foreman and assigned to run a project called the Equinox project. With this promotion, Vega was given a $3 per hour wage increase. However, one electrician who worked with Vega on the Equinox project received the same rate of pay and another employee received $2 per hour more than Vega. Vega did not have the authority to hire, transfer, suspend, lay off, recall, promote, discharge, reward or discipline employees. All authority regarding personnel decisions rested with field superintendent, Shane Lewis. In March, Vega protested against his inability to discipline an employee on the Equinox project and Lewis disciplined Vega for that protest. Vega reported to Lewis and project manager, Vic Bausell. While Vega did represent the Employer at meetings at the Equinox project, Bausell and Lewis accompanied him.

Vega, like the Employer's other foremen, laid out the work for the other electricians, ordered material and filled out daily logs. From December until March, the job employed as many as 18 employees. During this time period Vega did not work with his tools. From

November to December and then again from March to the time the job was completed in April, Vega also worked with the tools of the electrical trade. The only difference between Vega and the Employer's other foremen was that the Equinox project was substantially larger than the Employer's other construction jobs. In March, the Employer had other electricians take over some of Vega's duties regarding ordering supplies. Further, in March, Lewis and Bausell supervised the Equinox project in addition to Vega.

The Employer contends that Vega was given the title of assistant superintendent. The evidence shows that Shari Smith, the Employer's controller, gave Vega this title without any knowledge on Vega's part. Smith made this notation because she felt Vega was the person that employees should contact if they could not reach Lewis. Smith had no real knowledge of Vega's job duties.

The Employer contends that Vega effectively recommended the hire of four employees. The credible evidence shows that when Lewis had openings for hire he requested recommendations from Vega. Vega merely told fellow electricians that Lewis had openings and to send their resumes to Lewis. Vega had no further participation in the hiring process. Lewis said that he hired these employees simply on "Tony's word." I do not credit such testimony. Rather, I find Lewis offered this testimony in an attempt to disqualify Vega, a Union organizer, from voting.

In the construction industry, individuals may be employed as foremen on one job and as rank-and-file workers on the next. Many of the employees in this case worked both as foreman and as journeymen electricians. Although Vega was paid as a foreman on the Equinox job, he was not the Employer's highest paid employee. The evidence establishes on that job he worked as the lead electrician but that Lewis still maintained control over personnel decisions on that job as well as all of the Employer's other jobs. Thus, I find that Vega was not a statutory supervisor. See, e.g., *Plumbers Local 137 (Hames Constr.)*, 207 NLRB 359 (1973); *Plumbers Local 725 (powers Regulator Co.),* 225 NLRB 138, 145 (1976*)*; *Nassau & Suffolk Contractors' Assn.*, 118 NLRB 174, 180-181 (1975).

Since 2003, Allan Martinez has worked for the Employer as an electrical foreman. Martinez works service jobs and often works alone. When Martinez has other employees working with him, he acts as foreman. Martinez has never been foreman on a job as substantial as the Equinox project. Martinez works with the tools of the electrical trade every day and on every job that he works. There is no evidence that Martinez has ever exercised any of the authority listed in Section 2(11) of the Act. Accordingly, I find that Martinez is not a supervisor within the meaning of Section 2(11) of the Act and I recommend that the challenge to his ballot should be overruled and his ballot should be opened and counted.

B. The Ballots of Kevin Youngs, Corey Howey and Daniel Sohler

The Union contends that Kevin Youngs quit his employment prior to the election and that Corey Howey was not hired until March 14, subsequent to the eligibility date of March 8. Respondent contends that Youngs was on a leave of absence from April1 to September 1, 2005, and that Howey was on a leave of absence from May 2004 until he returned to work for the Employer on March 14, 2005. The Employer contends that Daniel Sohler quit his employment in June 2004, and thus, was ineligible to vote in the election. The Union contends that Sohler was laid off and had a reasonable expectation of returning to work.

To be eligible to vote in a Board election, the employee must be in the appropriate unit (1) on the established eligibility date, which is normally during the payroll period immediately

preceding the date of the direction of election, or election agreement, and (2) in employee status on the date of the election. See, for example, *Plymouth Towing Co.*, 178 NLRB 651 (1969); *Greenspan Engraving Corp.*, 137 NLRB 1308 (1962); *Gulf States Asphalt Co.*, 106 NLRB 1212 (1953); *Reade Mfg. Co.*, 100 NLRB 87 (1951); *Bill Heath, Inc.*, 89 NLRB 1555 (1949); *Macy's Missouri-Kansas Division v. NLRB*, 389 F.2d 835 (8th Cir. 1968); and *Beverly Manor Nursing Home*, 310 NLRB 538 fn. 3 (1993). Individuals who were scheduled to become supervisors after the date of the election were eligible to vote because they were employees during the eligibility period. *Nichols House Nursing Home*, 332 NLRB 1428 (2000).

The employee must be employed and working on the established eligibility date, unless absent for reasons specified in the direction of election. See, for example, *Roy N. Lotspeich Publishing Co.*, 204 NLRB 517 (1973). Those reasons are illness, vacation, temporary layoff status, and military service. See also *NLRB v. Dalton Sheet Metal Co.*, 472 F.2d 257 (5th Cir. 1973); *Amoco Oil Corp.*, 289 NLRB 280 (1988); *Schick, Inc.*, 114 NLRB 931 (1956); *Barry Controls*, 113 NLRB 26 (1955). In the instant case, the payroll period for eligibility is the one ending on March 8, 2005.

The general rule is qualified by exceptions applicable to certain classes or groups of employees and to special circumstances. The Employer here is engaged as an electrical contractor in the construction industry. Eligibility to vote in construction industry elections is determined by the use of the *Daniel* formula. This formula was announced in two *Daniel Construction Co.* cases, *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified at 167 NLRB 1078 (1967). In 1991 the Board made additional changes in the construction industry formula.

In 1992, the Board reconsidered its *Whitty* decision *(S. K. Whitty & Co.*, 304 NLRB 776 (1991)) and, with slight modification, returned to its *Daniel* policy. See *Steiny & Co.*, 308 NLRB 1323 (1992). See also *Atlantic Industrial Constructors*, 324 NLRB 355 (1997); *Brown & Root*, Inc., 314 NLRB 19 (1994); *Delta Diversified Enterprises*, 314 NLRB 946 (1994); and *Johnson Controls, Inc.*, 322 NLRB 669 (1996). The *Daniel* formula provides that, in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for 30 days or more within the 12 months preceding the eligibility date for the election, or if they have had some employment in those 12 months and have been employed for 45 days or more within the 24-month period immediately preceding the eligibility date. The *Daniel* formula was later clarified to exclude those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed.

As the Board noted in *Steiny*, the *Daniel* formula does not affect core employees who would be eligible to vote under traditional standards nor does it preclude the parties from a stipulation not to use the *Daniel* formula (fn. 16). *Ellis Electric*, 315 NLRB 1187 (1994). But the formula is used in all construction industry elections unless the parties stipulate not to use it. *Signet Testing Laboratories*, 330 NLRB 1 (1999). In the instant case, the parties did not stipulate not to use the *Daniel* formula and, in fact, both parties cite the *Daniel* formula to support their arguments.

The Employer hired Kevin Youngs as an electrician in September 2000. Youngs worked as an electrician and as a foreman until March 31, 2005. In March 2005, Youngs expressed to his co-workers that he intended to quit his employment and move to Idaho. Youngs' intention was to prepare his house in Idaho for sale and then travel to Colorado to visit with family. Youngs expressed no desire to return to California or to return to work for the Employer. However, after discussing the matter with the Employer's managers, Youngs reconsidered the matter. On March 31, 2005, Youngs entered into an agreement with Shari Smith, the

Employer's controller, for a five-month leave of absence. Under this agreement, the Employer agreed "to return Youngs to full employee status with benefits at the time of the agreed return to normal working status and insurance criteria are met." Youngs agreed to "provide within this timeframe advance notice of availability and intention to return to work."

Youngs testified that after reaching agreement on the leave of absence he told as many of his co-workers as he could that he had a leave of absence and intended to return to work for the Employer. At the hearing Youngs testified that he had worked on his house and had a pending sale. He further testified that he intended to return to work for Farris Electric prior to the expiration of his leave. Youngs returned from Idaho to vote in the election. Shane Lewis, the Employer's field superintendent, paid for the airfare for that trip. Youngs drove from Idaho to the instant hearing at his own expense.

Shari Smith, the Employer's controller, testified that she and Youngs agreed that five months would give Youngs sufficient time to prepare his house and sell it before returning to work. Smith prepared the letter of agreement for the leave of absence and signed it on behalf of the Employer.

There is no dispute that Youngs worked more than enough days for the Employer to qualify under the *Daniel* formula. The evidence is also clear that Youngs intended to return to vote in the election in favor of the Employer's position against union representation. It is also clear that both the Employer and the Union were aware of Youngs' position concerning representation. The Union contends that Youngs voluntarily quit his employment prior to the election.

The testimony of Youngs and Smith establishes that Youngs, while considering quitting his employment, instead took a voluntary leave of absence. If under the *Daniel* formula a qualifying employee on layoff is eligible to vote, clearly a qualifying employee with a leave of absence should be entitled to vote. Here, Youngs had a reasonable expectancy of re-employment in the near future. Thus, I find that Youngs is an eligible voter and that his ballot should be counted.

The Employer hired Corey Howey as an electrician in September 1991. Howey worked as an electrician and as a foreman until May 27, 2004. Howey was the Employer's highest paid electrician and foreman. On May 27, 2004, Howey entered into an agreement with Smith for a leave of absence for a "period of one year." The Employer agreed to "return Corey to full employee status with benefits at the time of the agreed return to normal working status and as insurance contract criteria are met." Howey agreed to "provide within this timeframe advance notice of availability and intention to return to work."

Howey testified that in May 2004 he was in the midst of a divorce and needed to sell his home. Howey was going to quit but the Employer offered him a leave of absence and Howey accepted the leave. Howey left the area and moved in with relatives in San Ramon, California. He took a job with an electrical contractor closer to his new residence. In November 2004, Howey moved back to the San Jose area. In early March 2005, Howey contacted the Employer and requested a return to work. Howey returned to work for the Employer on March 14, 2005. He was again the Employer's highest paid electrician.

Smith testified that Howey was going to quit in May 2004 because of personal problems. Smith, after discussing the matter with the Employer's management, offered Howey a leave of absence. Howey accepted the leave of absence.

Howey worked a sufficient number of days to qualify for voter eligibility under the *Daniel* formula. While he was not rehired until after March 8, because of the *Daniel* formula he should be treated no less than an employee on layoff with a reasonable expectation of re-employment in the near future. As of March 8, Howey had a written leave of absence for a definite time period. Thus, within the context of the construction industry and the *Daniel* formula, Howey had a reasonable expectation of a return to work. Accordingly, I shall overrule the challenge to his ballot.

Daniel Sohler testified that he worked for the Employer as an electrician from April 2004 until July 2004. Sohler testified that he last worked for the Employer in late June 2004 and then was laid off. According to Sohler, he waited to be recalled for work but after not receiving work from the Employer, he obtained work with another contractor. Sohler testified that he quit in early July 2004. According to Sohler, when he quit, Vic Bausell, project manager, told him that the Employer would have recalled Sohler the following week.

Smith testified that Mitchell told her that Sohler had quit on June 25, 2004. Smith wrote on Sohler's personnel file on June 25, "06/25/04 last day quit - (must check CDL-to rehire)." Smith explained that Sohler did not have a California driver's license but only a license from Oregon. There was an issue as to whether Sohler's license had been renewed. In November 2004, Smith reported to the California Employment Development Department that Sohler had quit his employment on June 25, 2004. On rebuttal, Sohler testified that he did not quit but simply informed Vic Bausell, project manager, that he had obtained employment elsewhere. I find that Sohler did in fact quit his employment in June 2004.

Employees who quit their employment, and stop working on a date prior to the date of the election, are not eligible to vote. *Dakota Fire Protection Inc.*, 337 NLRB 92 (2001); *Orange Blossom Manor*, 324 NLRB 846 (1997), and *Birmingham Cartage Co.*, 193 NLRB 1057 (1971). Eligibility is assessed based on the facts existing on or before the eligibility date, not on the date of the election. Thus, employees who had been recalled before the election were considered ineligible because as of the eligibility date, the Board found that they did not have a reasonable expectancy of recall. *Osram Sylvania, Inc.*, 325 NLRB 758 (1998).

As stated earlier, eligibility to vote in the construction industry elections is determined by the use of the *Daniel* formula. The *Daniel* formula is used to determine reasonable expectation of recall. The *Daniel* formula was later clarified to exclude those employees who had been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. Here, prior to March 8, 2005, the Employer's records indicated that Sohler had been a voluntary quit. There had been no contact between the Employer and Sohler between June 2004 and April 2005. Even when the Employer needed employees for the Equinox jobsite in late 2004 and early 2005 it did not contact Sohler. Accordingly, I find that Sohler did not have a reasonable expectation of returning to work for the Employer. Thus, I sustain the challenge to the ballot of Daniel Sohler.

Conclusion

In the manner described fully above, I recommend that the ballots of Shane Parisi, Mario Munoz, Tony Vega, Allan Martinez, Kevin Youngs, and Corey Howey be opened and counted. Thereafter, the Regional Director for Region 32 shall prepare and serve on the parties a revised tally of ballots.[3]

Dated: San Francisco, California, June 13, 2005.

Jay R. Pollack
Administrative Law Judge

[3] Any party may, under the provisions of Section 102.67 and 102.69 of the Board's Rules and Regulations, file exceptions to this report with the Board in Washington, D.C., within fourteen (14) days from the issuance of this report and recommendations. Immediately upon filing of such exceptions, the party filing the same shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. Exceptions must be received by the Board in Washington, D.C. by June 24, 2005. If no party files exceptions thereto, the Board may adopt the recommendations set forth herein.